Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-	)	
CABLE TELEVISION	)	CC Docket No. 87-266
Cross-Ownership Rules,	)	
Sections 63.54-63.58	)	

FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: January 12, 1995 **Released: January 20, 1995**

Comment Date: March 6, 1995
Reply Comment Date: March 21, 1995

By the Commission: Commissioners Barrett, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. In recent years, we have adopted a series of orders to permit telephone companies to play a broader role in the video marketplace.[1] The "video dialtone" framework we established in these orders was designed to be consistent with the cross-ownership restrictions imposed by the Cable Communications Policy Act of 1984 (1984 Cable Act).[2] The telco-cable cross-ownership ban prohibits telephone companies from providing video programming directly to subscribers in their telephone service areas.

2. The United States Courts of Appeals for the Fourth and Ninth Circuits recently ruled that the 1984 Cable Act's cross-ownership restriction violates the First Amendment rights of telephone companies.[3] United States District Courts in three other circuits have also reached the same conclusion.[4] We issue

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1 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (First Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) (Memorandum Opinion and Order on Reconsideration), aff'd, National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994) (NCTA v. FCC (1994)); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Second Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994) (Video Dialtone Reconsideration Order), appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

2 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b), 98 Stat. 2779 (codified at 47 U.S.C. § 533(b)) ("telco-cable cross-ownership ban or restriction").

3 Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir. Nov. 21, 1994) (C&P Tel. Co. v. U.S.); U S West, Inc. v. United States, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. December 30, 1994) (U S West v. U.S.).

4 BellSouth Corp. v. United States, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994) (BellSouth v. U.S.); Ameritech Corp. v. United States, 867 F.Supp. 721 (N.D. Ill. 1994); (Ameritech

this Fourth Further Notice of Proposed Rulemaking to consider changes in our video dialtone rules and policies in light of these decisions, and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities. We intend through this notice to consider rules and policies to govern the provision of video programming over video dialtone facilities by telephone companies not subject to the 1984 Cable Act cross-ownership restriction. To the extent a telephone company remains subject to the ban, our existing video dialtone framework will continue to apply. We also seek comment on certain related issues.

II. BACKGROUND

3. The telco-cable cross-ownership restriction has its roots in a Commission rule adopted in 1970. At that time, the cable television industry was in its infancy, and the Commission was concerned that, if permitted to offer cable television services in their telephone service areas, telephone companies would be able to monopolize this emerging industry. In the 1984 Cable Act, Congress enacted a provision modeled after the Commission's cross-ownership restriction. The new statutory ban prohibited telephone companies from providing video programming directly to subscribers in their telephone service areas.[5] "Video programming" was defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[6] The legislation also included a rural exemption and waiver authority for the Commission.[7]

4. In 1991, the Commission proposed to amend its telco-cable cross-ownership rules to permit local exchange carriers (LECs) to play a broader role in the video marketplace, consistent with the 1984 Cable Act.[8] Specifically, the Commission proposed to permit LECs to provide video dialtone service, which it described as "an enriched version of video common carriage under which LECs will offer various non-programming services in addition to the underlying video

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v. U.S.) NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994) (NYNEX v. U.S.).

5 See 47 U.S.C. § 533(b)(1).

6 47 U.S.C. § 522(19).

7 Id. § 533(b)(3), (b)(4).

8 See First Report and Order, 7 FCC Rcd 300.

transport."[9] The Commission concluded that LECs offering video dialtone service would not need a cable franchise under Section 621(b) of the 1984 Cable Act because (1) video dialtone service is not "cable service" as defined in the 1984 Cable Act and (2) LECs are not "cable operators" as defined in that Act.[10] In addition, the Commission determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act.[11] The Commission's video dialtone-franchise decisions have been upheld by the U.S. Court of Appeals for the District of Columbia Circuit in NCTA v. FCC (1994).[12]

5. In 1992, the Commission adopted the video dialtone proposal outlined in its 1991 Notice.[13] Under video dialtone, LECs may offer, on a nondiscriminatory basis, a basic common carrier video delivery platform capable of accommodating multiple video programmers.[14] This "first level platform" is subject to regulation under Title II of the Communications Act. LECs may also offer enhanced and other non-regulated services provided they comply with existing regulatory safeguards.[15] LECs proposing to construct video dialtone facilities must first obtain approval

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9 Id. at 306, para. 10.

10 Section 621(b)(1) provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1).

11 First Report and Order, 7 FCC Rcd at 327-28, para. 52.

12 NCTA v. FCC (1994), 33 F.3d 66.

13 See generally, Second Report and Order, 7 FCC Rcd 5781.

14 Second Report and Order, 7 FCC Rcd at 5797, para. 29.

15 Id. at 5811, para. 58, 5828, para. 92. These safeguards include accounting and cost allocation rules to separate the costs of providing enhanced and other non-regulated services from the costs of providing regulated services, as well as network disclosure rules to ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment with the network. In addition, we held that the Bell Operating Companies (BOCs) and GTE Services Corporation (GTE) must adhere to Open Network Architecture (ONA) requirements and other safeguards adopted in the BOC Safeguards Order, including rules governing the use of customer proprietary network information. See infra note 70.

under Section 214 of the Communications Act of 1934, as amended (the Act).[16]

6. Consistent with the 1984 Cable Act's cross-ownership restriction, the Commission prohibited LECs offering video dialtone service from providing video programming directly to subscribers in their telephone service areas, either through the telephone operating company or through an affiliate.[17] A LEC would be deemed to "provide" video programming if it determined how video programming is presented for sale to subscribers, including making decisions concerning the bundling, or "tiering" of the programming or the price, terms, or conditions on which the programming is offered to subscribers.[18] In addition, LECs were precluded from holding an ownership interest of 5 percent or more in a video programmer that offers service in a LEC's telephone service area.[19] At the same time, however, we recommended that Congress amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide video programming directly to subscribers in their telephone service areas.[20] We stated that if Congress repealed the ban, we would consider imposing certain safeguards on LECs providing video programming directly to subscribers. These safeguards included: a structural separation requirement; a requirement that the LEC's video programming services be provided through the video dialtone platform that provides service to multiple video programmers; and

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16 Second Report and Order at 5820, para. 72; see 47 U.S.C. § 214(a).

17 The Commission adopted detailed ownership and non-ownership affiliation rules to implement this requirement. These rules are set forth at 47 C.F.R. § 63.54. The Commission is currently considering changes to its ownership attribution rules in various other contexts. See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51, and 87-154, FCC No. 94-324 (released January 12, 1995). We ask for comment on what impact, if any, any such changes in other contexts might have here.

18 Second Report and Order at 5817, para. 69; Video Dialtone Reconsideration Order at para. 64.

19 Second Report and Order at 5801, 5819, paras. 36, 71; see Video Dialtone Reconsideration Order at paras. 64-70.

20 Second Report and Order, 7 FCC Rcd at 5847, para. 135.

a limit on the percentage of overall platform capacity a LEC could use to transmit its own programming.[21]

7. In October 1994, we affirmed the basic video dialtone framework, while modifying our specific video dialtone rules and policies in various respects.[22] We also affirmed and reiterated our recommendation that Congress repeal the 1984 Cable Act cross-ownership ban. We stated that "[g]iven the enormous growth of the cable industry during the past decade, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly."[23] We noted that while there remains some risk of anticompetitive behavior by LECs, this risk can and should be addressed through our video dialtone framework and other appropriate regulatory safeguards.[24] We did not comment on the need for any particular safeguards, indicating instead that we would address these issues in a subsequent proceeding.

8. Congress has not repealed the telco-cable cross-ownership restriction. Several federal courts have, however, declared the ban unconstitutional as a violation of the First Amendment.[25] The Fourth Circuit, for example, determined that the cross-ownership ban violates the free speech clause because it is not "narrowly tailored to serve a significant government interest" and does not make ample alternative methods of communication available that are "sufficiently similar to the method foreclosed by the regulation."[26]

III. FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

A. Governing Statutory Provisions

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21 Id. at 5847-48, para. 135.

22 See Video Dialtone Reconsideration Order, supra note 1.

23 Video Dialtone Reconsideration Order at para. 265.

24 Id.

25 See C&P Tel. Co. v. U.S., U S West v. U.S., BellSouth v. U.S., Ameritech v. U.S., and NYNEX v. U.S., supra notes 3 and 4.

26 C&P Tel. Co. v. U.S., No. 93-2340, slip op. at 31, 40 (citations omitted). The Ninth Circuit also found the provision was not "narrowly tailored," but declined to reach the issue of the availability of "ample alternative channels of communications." U S West v. U.S. slip op. at 15913.

9. LEC provision of video programming raises questions about whether Title II, Title VI, or both, would govern particular LEC video offerings, and how these provisions might apply to a LEC's provision of video programming directly to subscribers within its telephone service area and over facilities used to provide both voice and video services. We now seek comment on these issues and on the analysis we offer below.[27]

1. Application of Title II to LEC Video Programming Offerings

10. We first tentatively conclude that telephone companies should be permitted to provide video programming over Title II video dialtone platforms. We recently reaffirmed our conclusion that the construction of video dialtone systems would serve the public interest goals of facilitating competition in the provision of video programming services, encouraging efficient investment in our national information infrastructure, and fostering the availability to the American public of new and diverse sources of video programming.[28] Two U.S. Courts of Appeals have now held unconstitutional the specific statutory basis for prohibiting a telephone company from providing, directly or indirectly, programming over its own video dialtone platform.[29] In light of the public interest benefits of a video dialtone platform, which provides multiple video programmers with common carrier-based access to end users, we tentatively conclude, in the absence of Section 533(b), that we should not ban telephone companies from providing their own video programming over their video dialtone platforms. We note that we allow telephone companies to use their networks to provide their

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27 We recognize the existence and importance of a number of other policy and legal issues beyond those raised in this Notice. In general, we note that the entry of telephone companies into the provision of video programming also raises questions regarding the impact of our regulation on the ability of cable operators to respond to the deployment of video dialtone, as well as broader issues regarding potential regulatory disparities among video dialtone providers, cable operators, and other multichannel video programmers. Our decision to issue this Notice to address the specific questions arising directly from the recent court decisions is not intended to foreclose future consideration elsewhere of these broader issues.

28 Video Dialtone Reconsideration Order at para. 3.

29 See generally, C&P Tel. Co. v. U.S. and U S West v. U.S. supra note 3.

own enhanced services today, subject to safeguards. Thus, in the absence of a demonstration of a significant governmental interest to the contrary, we propose to allow telephone companies to provide video programming over their own video dialtone platforms, subject to appropriate safeguards. We seek comment on this proposal, and on whether any such significant governmental interest to support a ban exists and, if it does, whether a ban would be a narrowly tailored restriction on the telephone companies' First Amendment rights.

11. A second Title II issue is whether we can, and should, require telephone companies to provide video programming only over video dialtone platforms. Even before the recent court decisions invalidating the telco-cable cross-ownership ban, there were three circumstances in which LECs could provide video programming directly to subscribers. Within their telephone service areas, LECs have been permitted to provide video programming in areas covered by the rural exemption to the telco-cable cross-ownership ban, or if they received a waiver of Sections 613(b)(1) or (b)(2).[30] In both these situations, we have required LECs to obtain authorization under Section 214 of the

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30 See 47 U.S.C. §§ 533(b)(3), (b)(4); 47 C.F.R. §§ 63.56, 63.58. Section 613(b)(4) authorizes the Commission to waive the cross-ownership prohibition under either of two independent criteria. First, the Commission may waive the restriction when it determines that "the provision of video programming directly to subscribers through a cable system demonstrably could not exist [within the LEC's telephone service area] except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved." 47 U.S.C. § 533(b)(4). Alternatively, the Commission may grant a waiver upon other showing of good cause. Id. The Commission has exercised its authority to grant waivers of the cross-ownership ban in certain circumstances. See Time Warner Entertainment Co., L.P. and U S WEST Communications, Inc., 8 FCC Rcd 7106 (1993) (granting temporary waiver of prohibition upon demonstration of good cause to permit divestiture of cable systems after a merger); General Tel. Co. of California, 4 FCC Rcd 5693 (1989) (good cause waiver to permit telephone company involvement in cable television experiment), remanded, NCTA v. FCC, 914 F.2d 285, 287 (1990) (NCTA v. FCC (1990)), waiver rescinded on remand, 8 FCC Rcd 8178 (1993), aff'd sub nom. GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994) (GTE California v. FCC), petition for rehearing pending; Shenandoah Tel. Co., 84 FCC 2d 371 (1981) (granting waiver for good cause based on small size and rural nature of areas in question).

Communications Act before constructing facilities.[31] In addition, outside their telephone service area, LECs have been able to purchase an existing cable system or apply for a franchise to construct a new cable system.[32] A LEC is not required to apply for Section 214 authorization if it is constructing facilities for the provision of cable service outside of its telephone service area.[33] In all these instances, there was a video programming offering that was treated as a traditional cable offering requiring a franchise under Title VI.

12. In these circumstances, however, LECs have not been authorized to use their local exchange facilities to provide cable service, but, rather, to construct or purchase interests in separate cable facilities. Indeed, as noted by the court in NCTA v. FCC (1994), it was not until after the 1984 Cable Act that technological advances have made it practical to deliver video signals over the same common carrier networks that are used to provide telephone service.[34] Previously, as the court noted, "[a] telephone company that wanted to provide cable service would have had to construct a coaxial cable distribution system parallel to its telephone system."[35]

13. We seek comment on whether we have authority under Section 214 to require LECs that seek to provide video programming directly to subscribers in their telephone service areas to do so on a video dialtone common carrier platform and not on a non-common carrier cable television facility. We seek comment on what circumstance would warrant such a requirement, and specifically on whether we should require use of a video dialtone platform whenever a LEC provides video services over

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31 47 U.S.C. § 214(a).

32 For example, SBC Communications, Inc., a holding company that owns a Bell Operating Company providing local exchange and exchange access telephone services in the southwestern United States, purchased two cable systems in the metropolitan Washington, D.C. area from Hauser Communications, Inc. in early 1994. U S WEST, Inc. also recently completed its acquisition of cable systems in the Atlanta, Georgia area, which is outside of its LEC's telephone service area. In both these examples, the LEC holds a cable franchise pursuant to Section 621 from the local franchising authority.

33 47 C.F.R. § 63.08(a).

34 NCTA v. FCC (1994), 33 F.3d at 69.

35 Id.

facilities that are also used in the provision of telephone services. We seek comment on our authority generally to require LECs seeking Section 214 authority to acquire or construct video facilities to comply with our video dialtone framework.[36]

2. Application of Title VI to LEC Provision of Video Programming

14. We now seek comment on the circumstances, if any, in which a LEC that, by court decision, is not subject to the 1984 Cable Act telco-cable cross-ownership ban may offer a cable service subject to Title VI in lieu of a Title II video dialtone offering. We also seek comment on the extent to which Title VI should apply to video programming provided by LECs on a Title II video dialtone system. As noted, we have previously held that LEC provision of a common carrier video dialtone platform is not subject to Title VI of the Act.[37] In particular, we found that such LECs are not offering "cable service," and are not operating a "cable system" within the meaning of Title VI.[38] We reasoned

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36 See 47 U.S.C. § 214(c).

37 First Report and Order, 7 FCC Rcd at 324, para. 50, aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5070, para. 11.

38 First Report and Order, 7 FCC Rcd at 326-27, para. 51, aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5071-73, paras. 13-25. The Commission also determined that an independent customer-programmer of a LEC's video dialtone platform is not a "cable operator" and consequently, is not subject to the franchise requirement of the 1984 Cable Act. See supra para. 4.

The 1984 Cable Act defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5). A "cable system" is defined as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment

that LECs did not actively participate in the selection and distribution of video programming because they were precluded from providing video programming directly to subscribers in their telephone service areas.[39] We also concluded that video dialtone facilities are not cable systems because they are common carrier facilities subject to Title II of the Act which, under Commission rules, could not be used for LEC provision of video programming directly to subscribers in the LEC's telephone service area.

15. We now seek comment on whether, if a LEC, or its affiliate, does provide video programming over its video dialtone system and actively engages in the selection and distribution of such programming, that LEC, or its affiliate, is subject to Title VI. We seek comment on the Commission's legal authority to determine whether some, but not all, provisions of Title VI relating to cable operators would apply to a LEC that provides video programming over its video dialtone platform. We also seek comment on whether the application of some or all provisions of Title VI would result in a regulatory framework that is duplicative of, or inconsistent with, federal or state regulation of communications common carriage. For example, the goals of the leased access provision of Title VI could be met through obligations Title II imposes on a LEC as the provider of the video dialtone platform whether or not the LEC as a video service provider provides its own leased access channels.[40] We seek comment on the potential impact of our determinations in this proceeding on existing grants by state and local authorities of public rights-of-way. We also invite parties to discuss both the legal and practical implications of requiring, or not requiring,

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> that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . .
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> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers . . . .
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> 47 U.S.C. § 522(7).

39 See Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd at 5071, 5072-73, paras. 16, 24.

40 See 47 U.S.C. § 532.

telephone companies providing video programming over their own video dialtone systems to comply with each of the various provisions of Title VI. In the event that Title VI cable rate regulation rules apply, we seek comment on how such rules would apply to a LEC providing video programming directly to subscribers over its own video dialtone platform.

16. In addition, we seek comment on whether, if Title VI does not apply to telephone companies' provision of video programming on video dialtone facilities, the Commission should adopt, under Title II, provisions that are analogous to certain aspects of Title VI. For example, we seek comment on whether we should adopt rules governing program access by competing distributors, carriage agreements between video service providers and unaffiliated programmers, and vertical ownership restrictions.[41]

17. Finally, we note that the court's opinion in NCTA v. FCC (1994) is consistent with the Commission's reasoning in the First Report and Order that a LEC providing video dialtone service does not require a local franchise because the LEC does not provide the video programming. We seek comment on whether this view would require a LEC offering video dialtone service to secure a local franchise if that LEC also engages in the provision of video programming carried on its platform.

B. Regulatory Safeguards Governing a Local Exchange Carrier's Provision of Video Programming on its Video Dialtone Platform

1. Introduction and Scope

18. In this section we consider what changes, if any, need to be made to our video dialtone regulatory framework if a telephone company, pursuant to an applicable court decision, decides to become a video programmer on its own video dialtone platform in its telephone service area.[42] Our previous decisions

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41 See infra para. 23.

42 In amendments to its Section 214 applications to provide video dialtone service, Bell Atlantic requested permission from the Commission to provide video programming over its own video dialtone systems. See Bell Atlantic Telephone Company (Bell Atlantic), File No. W-P-C 6912 (application filed December 16, 1993, amendment filed June 16, 1994), Bell Atlantic, File No. W-P-C 6966 (application filed June 16, 1994). The Commission granted Bell Atlantic's amended application to provide video programming over its video dialtone system in a market trial in Northern Virginia,

establishing the regulatory framework for video dialtone were premised on the assumption that LECs would not be able to be customer-programmers of their own video dialtone systems. Our purpose herein is to determine whether LEC provision of video programming raises new concerns about anticompetitive behavior or cross-subsidy that our existing regulatory framework and safeguards may not sufficiently address. In addressing the issues identified below, parties should address whether we should apply different safeguards for technical and market trials than for commercial offerings of video dialtone.

2. Ownership Affiliation Standards

19. Under our current rules, LECs are prohibited from providing video programming directly to subscribers, and from having a cognizable (i.e., 5 percent or more) financial interest in, or exercising direct or indirect control over, any entity that is deemed to provide video programming in its telephone service area.[43] Although we now propose to permit telephone companies to provide video programming over video dialtone platforms, we propose to retain these ownership affiliation standards to identify those video dialtone programmers that we will consider to be affiliated with LECs providing the underlying common carriage. Under this proposal, if the Commission determines that LEC ownership of video programming requires additional safeguards, those safeguards would apply if the LEC owned five percent or more of a video programmer. We seek comment on this proposal.

3. Safeguards Against Anticompetitive Conduct

a. Sufficient Capacity to Serve Multiple Service Providers

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subject to certain conditions. Bell Atlantic, File No. W-P-C-6834 (released January 20, 1995) (Bell Atlantic Market Trial Order).

43 In the Video Dialtone Reconsideration Order, the Commission affirmed, with some modifications and clarifications, its ownership affiliation rules. The Commission upheld its earlier determination that, consistent with the cross-ownership ban, it was impermissible for a LEC to own five percent or more of a video programmer. For purposes of the video dialtone rules, a video programmer was defined as any person who provides video programming directly, or indirectly through an affiliate, to subscribers. See Video Dialtone Reconsideration Order at paras. 64-74. See also supra para. 6.

20. Under the video dialtone regulatory framework, a LEC is required to provide sufficient capacity to serve multiple service providers on a nondiscriminatory basis. In the Video Dialtone Reconsideration Order, we rejected use of an "anchor programmer," that is, allocation of all or substantially all of the analog capacity of the video dialtone platform to a single programmer.[44] We seek comment on whether there are other across-the-board rules that we should adopt to ensure that video dialtone retains its essential Title II character when a LEC becomes a video programmer on its platform.

21. We seek comment, for instance, on whether we should limit the percentage of its own video dialtone platform capacity that a LEC, or its affiliate, may use. Such a limit could help ensure other programmers access, but may create a risk that some capacity might go unused. We seek comment on what an appropriate limit would be; whether any percentage limit should vary with the platform's capacity; and whether different rules should apply to analog and digital channels.[45] Video dialtone capacity constraints appear likely to be most severe in the short-term, with respect to analog channels, and may be of less concern on future all-digital systems. Commenters should address whether LEC use of video dialtone capacity raises short-term or long-term concerns, and how the probable duration of the problem should affect our regulatory approach. Alternatively, we seek comment on whether LECs that deny capacity to independent programmers should be subject to procedural requirements more detailed than those imposed in the Video Dialtone Reconsideration Order.[46]

22. In the Third Further Notice of Proposed Rulemaking (Third Further Notice), the Commission sought comment and information regarding channel sharing mechanisms that LECs have proposed as means of making analog capacity available to more customer-programmers than might otherwise be accommodated.[47] Parties addressing limits on LEC use of the video dialtone platforms should comment in this proceeding on the relationship between such channel sharing mechanisms and any proposal to limit LEC use of analog channels. The Third Further Notice also sought comment on two other signal carriage issues: (1) whether the

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44 Video Dialtone Reconsideration Order at para. 35.

45 We have previously suggested that a 25% capacity limit "strikes a reasonable balance among competing risks and benefits involved." Second Report and Order, 7 FCC Rcd at 5850-1 n.360.

46 Id. at para. 38.

47 Id. at paras. 268-275.

Commission should mandate preferential video dialtone access or rates for commercial broadcasters, public, educational and governmental ("PEG") channels, or other not-for-profit programmers; and (2) whether the Commission should permit LECs to offer preferential treatment to certain programmers on a voluntary ("will carry") basis.[48] Parties should comment in this proceeding on the relationships among mandatory preferential treatment, "will carry," and any proposed limits on a LEC's use of its video dialtone capacity to provide programming directly to subscribers.

23. Another example of potentially anticompetitive conduct that has been cited in the context of cable television service under Title VI involves channel positioning.[49] Programmers assert that cable operators can and do deliberately assign unaffiliated program services to undesirable channel locations.[50] Under Title II, such discriminatory conduct is prohibited. We seek comment on whether LECs that are also video program providers have an increased incentive to use their control over the video dialtone platform to engage in such activities and what, if any, specific safeguards we should implement to prevent such conduct. In particular, we seek comment on whether the channel positioning rules that apply to cable operators in the context of the "must-carry" requirement of Title VI[51] should also apply to video dialtone platform operators providing programming directly to subscribers in their local exchange service areas.

b. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

24. In the Video Dialtone Reconsideration Order, the Commission affirmed, with certain modifications, its decision to permit LECs to enter into non-ownership relationships with video

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48 Id. at paras. 280-284.

49 See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, 8583-84, paras. 41-43 (1993).

50 See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 FCC Rcd 4962, 5040, para. 151 (1990).

51 47 U.S.C. § 534(b)(6). In general, 47 U.S.C. § 534 requires cable operators to carry local television station signals and qualified low power television station signals.

programmers that exceed a carrier-user relationship.[52] Under the modified rules, a LEC is permitted to provide enhanced and other nonregulated services related to the provision of video programming (e.g., billing and collection or video gateway services) to any video programmer in its telephone service area, provided that the area is substantially served (i.e., 70 percent of the households in that area) by a video dialtone platform.[53] In addition, a LEC is not restricted by our rules regarding other types of non-ownership relationships with video programmers who are not franchised cable operators.[54]

25. At the same time, however, the Commission did not permit LECs to exceed the carrier-user relationship with cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires.[55] In addition, the Commission generally prohibited affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

26. After C&P Tel. Co. v. U.S. and U S West v. U.S., we propose, at a minimum, to retain these restrictions as safeguards against LEC anticompetitive conduct and to promote further LEC deployment of broadband services. We believe that the restrictions on non-ownership affiliations between LECs and cable operators are important to the Commission's goal of promoting competition in the video services marketplace, and are not overbroad infringements on LEC First Amendment rights. Parties should comment on the proposal to retain these safeguards and should describe any specific additional measures they believe necessary to safeguard against anticompetitive conduct by LECs that offer programming on their own video dialtone systems.

c. Acquisition of Cable Facilities

27. Throughout much of the video dialtone proceeding, the Commission has expressed a concern that LEC acquisition of in-region cable facilities to provide video dialtone could impede

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52 Video Dialtone Reconsideration Order at paras. 87-102.

53 Id. at para. 87.

54 Id. at para. 88.

55 The Commission permits LECs to lease cable drop wires from cable operators, subject to certain conditions. See Video Dialtone Reconsideration Order at paras. 54-55.

competition.[56] In the Video Dialtone Reconsideration Order, the Commission substantially affirmed its decision to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone.[57] We continue to believe that this ban will benefit the public interest by promoting greater competition in the delivery of video services, increasing the diversity of video programming available to consumers, and advancing the deployment of the national communications infrastructure.[58] We tentatively conclude that the ban on LEC acquisition of cable facilities for the provision of video dialtone does not impermissibly restrict LEC speech under C&P Tel. Co. v. U.S. and U S West v. U.S., and seek comment on this conclusion.

28. In the Third Further Notice, the Commission recognized that some markets may be incapable of supporting two video delivery systems. The Commission was concerned that, in such markets, the prohibition could preclude establishment of video dialtone service, thereby denying consumers the benefits of competition and diversity of programming sources that our video dialtone regulatory framework is designed to promote. As a result, the Commission requested parties to suggest criteria that would permit us to identify those markets in which two wire-based multi-channel video delivery systems would not be viable.[59] We seek comment on how, if at all, the decisions in C&P Tel. Co. v. U.S. and U S West v. U.S. should affect our consideration of criteria for allowing exceptions to our two-wire policy. We also seek comment on whether we should ban telephone company acquisition of cable facilities, with or without exceptions, if (a) Title VI applies to telephone companies providing programming on their own video dialtone platforms; or (b) telephone companies are permitted to become traditional cable operators in their own service areas instead of constructing video dialtone platforms.

d. Joint Marketing and Customer Proprietary Network Information

29. In the Video Dialtone Reconsideration Order, the Commission also affirmed its decision to permit LECs to engage in joint marketing of basic and enhanced video services, and of

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56 See, First Report and Order, 7 FCC Rcd at 309-310, para. 17. See also, Second Report and Order, at 5837-38, paras. 109-111.

57 Video Dialtone Reconsideration Order at para. 48.

58 Id. at para. 48.

59 Id. at paras. 276-79.

basic video and non-video services.[60] We found that significant public interest benefits can accrue from the efficiencies and innovations that may be obtained by permitting LECs to engage in joint marketing of basic and enhanced video services, and of basic video and non-video services.[61] We also found that the record on reconsideration did not support a finding that joint marketing of common carrier video and telephony services would have an anticompetitive impact on the provision of video programming to end users. We now seek comment on whether LEC provision of video programming directly to end users requires that we revisit our analysis of joint marketing issues.[62]

30. In the Bell Atlantic Market Trial Order the Commission authorized Bell Atlantic to conduct a six-month video dialtone market trial that will include provision of video programming directly to subscribers by a Bell Atlantic affiliate as well as by independent video programmers.[63] Pending resolution of the instant rulemaking proceeding, we conditioned Bell Atlantic's authorization on its compliance with existing safeguards for the provision of nonregulated services, including enhanced services, and with several additional, interim safeguards against discrimination.[64] We seek comment on whether any or all of these interim safeguards should be adopted as permanent requirements for LECs that provide video programming over their own video dialtone platforms.

31. Included among the Commission's existing nonstructural safeguards are customer proprietary network information (CPNI) requirements. Under these requirements, the Commission limits the BOCs' and GTE's use of CPNI; requires them to make CPNI available to competitive enhanced service providers (ESPs) designated by a customer; and requires that they make available to ESPs non-proprietary aggregated CPNI on the same terms and conditions on which they make such (CPNI) available to their own enhanced service personnel.[65] In the Video Dialtone Reconsideration Order, the Commission affirmed its decision to

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60 Id. at para. 240.

61 Id. at paras. 234-242.

62 Id. at paras. 239-242.

63 See Bell Atlantic Market Trial Order, supra note 42.

64 Id. at para 22.

65 Id. at para. 235.

apply existing enhanced services CPNI rules to video dialtone.[66] We determined that there was insufficient evidence to conclude that our existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the context of video dialtone.[67] The Commission also required the BOCs and GTE to provide additional information regarding the kinds of CPNI to which they will have access as a result of providing video dialtone service and indicated its intent to seek further comment on such information.[68] We now seek additional comment and information on whether LEC provision of video programming impacts the balancing of our goals for CPNI.

32. In addition to concerns over possible anticompetitive use of CPNI, parties should discuss whether LEC provision of video programming raises new concerns regarding consumer privacy. Parties that perceive a greater threat to consumer privacy should describe with specificity their concerns, and suggest specific safeguards for protecting consumer privacy, and explain how these suggestions benefit the public interest.

33. We also seek comment on safeguards to ensure nondiscriminatory access to network technical information. In the Bell Atlantic Market Trial Order, the Commission required Bell Atlantic to provide all video programmers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment.[69] The Commission also noted that, in the circumstances of the market trial, Bell Atlantic would also be subject to the more specific Computer III network disclosure rules.[70] We seek comment on

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66 Id. at para. 239.

67 Id. at para. 243 & n.456.

68 Id. at para. 244.

69 See Bell Atlantic Market Trial Order at para. 36.

70 See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7603-04, para. 70 (1991) (BOC Safeguards Order), vacated in part and remanded, California v. FCC. See also Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (released January 11, 1995), para. 23 (BOCs must continue to comply with Computer III safeguards against discrimination pending Commission action in response to the remand of the BOC Safeguards Order in California v. FCC, see infra note 71. As noted below, see infra note 71, the Ninth Circuit set aside, in part, our BOC Safeguards Order on review, finding that we had failed to

whether the Bell Atlantic condition should be adopted as a permanent safeguard. We also ask parties to address whether the Computer III network disclosure rules should be modified in any way for application in the video dialtone context.

4. Safeguards Against Cross-Subsidization of Video Programming Activities

34. In the Video Dialtone Reconsideration Order, the Commission determined that price cap regulation and accounting safeguards would be effective to prevent cross-subsidization of video dialtone-related nonregulated activities.[71] We tentatively conclude that these safeguards against cross-subsidization apply to LEC provision of video programming just as they would to any other activity not regulated as Title II common carrier service, and that the existing rules are adequate to forestall cross-subsidy of the video programming activity.[72] We seek comment on

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explain adequately our decision to lift structural separation requirements generally, based on the level of network unbundling reflected in the approved BOC ONA plans. California v. FCC, 39 F.3d at 929, 930. In any event, we propose here to consider whether structural separation is necessary or appropriate in the context of video programming services. See infra at para. 39.

71 Video Dialtone Reconsideration Order at paras. 179-182. The U.S. Court of Appeals for the Ninth Circuit recently vacated in part and remanded the BOC Safeguards Order, on the ground that the Commission had not adequately explored how, without full unbundling of BOC networks from ONA, discrimination could be prevented. The Ninth Circuit also held that the Commission did show that its regime of nonstructural safeguards adequately prevented improper cross-subsidization of enhanced services by BOCs. California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California v. FCC). See BOC Safeguards Order, supra note 70.

72 The Commission's accounting safeguards for nonregulated activities apply to most activities that are not classified as common carrier communications services for Title II purposes. Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities. Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and their Affiliates, 2 FCC Rcd 1298, 1307-08, paras. 69-78 (1987) (Joint Cost Order). Thus, those safeguards would apply to LEC video programming activities even if LEC provision of video programming were found to be

these tentative conclusions.

35. Assuming we do not require structural separation, LECs will have the flexibility to conduct video programming activities both within the telephone operating company and through affiliates. For those video programming activities conducted in the operating company, the LEC will be required to record costs and revenues in accordance with Part 32 of the Commission's Rules, the Uniform System of Accounts (USOA), and to separate the costs of video programming activity from the costs of regulated telephone service in accordance with the Part 64 joint cost rules.[73] We tentatively conclude that these rules are adequate to prevent cross-subsidization of video programming activities. We also tentatively conclude that we will apply to video programming activities the rule adopted in the Video Dialtone Reconsideration Order requiring LECs to amend their cost allocation manuals to reflect video dialtone-related nonregulated activities within 30 days of receiving video dialtone facilities authorization. We seek comment on these tentative conclusions.

36. If a LEC chooses for business reasons to provide video programming through an affiliate, the accounting treatment of operating company transactions with that affiliate will be governed by the affiliate transactions rules.[74] We seek comment on whether amendments to those rules are needed to safeguard against abuses in transactions between LECs and affiliated video program providers. Specifically, we seek comment on whether we should amend Section 32.27 to clarify that any video program provider that is considered, because of a LEC's five percent ownership interest, to be a LEC affiliate for purposes of applying video dialtone safeguards will also be considered an "affiliate" for purposes of the affiliate transactions rule.[75]

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regulated under Title VI.

73 47 C.F.R. §§ 64.901-905.

74 47 C.F.R. § 32.27.

75 The telephone affiliate transaction rules apply to transactions with a company that directly or indirectly controls, is controlled by, or is under common control with the operating company. See 47 C.F.R. § 32.9000. A company in which a LEC held a 5 percent ownership interest would not ordinarily fall within this definition. By contrast, the cable rate regulation rules use the five percent benchmark to define an affiliated programmer for the purposes of applying affiliate transaction rules. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a

5. Structural Separation

37. At divestiture, the Commission initially applied the Computer II structural separation requirements to the customer premises equipment (CPE) and enhanced services operations of the BOCs.[76] The Commission removed the structural separation requirement for CPE in 1987.[77] In reaching that decision, the Commission found that the BOCs had a small share of, and could not dominate, the competitive CPE market;[78] that concerns about cross-subsidy and discrimination could be addressed through nonstructural safeguards; and that the net benefits to telecommunications users of allowing the BOCs flexibility in marketing CPE were greater than the net benefits of structural separation.[79]

38. In the Computer III proceeding, the Commission replaced its requirement that BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards. Those nonstructural safeguards were intended to protect against discrimination and cross-subsidization while avoiding the inefficiencies associated with structural separation.[80] Using a cost/benefit analysis, the Commission concluded that, when compared with nonstructural safeguards, the costs of structural

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Uniform Accounting System for Provision of Regulated Cable Service, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, 4667-68, paras. 269-70 (1994).

76 Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, Report and Order, 95 FCC 2d 1117 (1984) (BOC Separation Order), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), aff'd on recon., FCC 84-252, 49 Fed. Reg. 26056 (1984), aff'd sub nom. North American Telecommunications Ass'n. v. FCC, 772 F.2d 1282 (7th Cir. 1985).

77 Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (BOC Structural Relief Order).

78 Id. at 147, paras. 25-26, 28.

79 Id. at 147-48, paras. 29-33.

80 Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174, at para. 1 (1990).

separation outweighed the benefits.[81] These costs included decreased efficiency, innovation, and service availability. The Commission determined that the provision of enhanced services on an integrated basis would allow BOCs to capture certain efficiencies, and capitalize on economies of scope and cost savings created by removing the need for duplicative personnel for sales, marketing, repair and installation, and research and development. In addition, the Commission believed that structural separation was an unnecessary government intrusion into business judgments regarding corporate organization.[82]

39. We seek comment on whether our approach to these questions should differ when BOCs provide video programming. Specifically, we seek comment as to whether there are aspects of the video programming business that warrant our treating BOC provision of video programming differently from the way we treat BOC provision of CPE and enhanced services generally. We also seek comment on whether any structural separation requirement should apply to LECs other than the BOCs. Commenting parties should specifically identify what aspects warrant different treatment, and what form of separation would be appropriate. Parties should also offer information concerning the relative costs and benefits of structural separation.

6. Pole Attachments

40. The Commission has long been concerned that telephone companies would use their control over poles and conduit space to disadvantage their competition. Section 63.57 of our rules requires LECs seeking to provide channel service to show in their Section 214 applications that the cable system for which they would be providing channel service had pole attachment rights or conduit space available "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator."[83] This rule is intended to prevent LECs from

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81 BOC Safeguards Order at 7614, para. & n.169.

82 BOC Safeguards Order at 7624, para. 108.

83 See 47 C.F.R. § 63.57. See also Video Dialtone Reconsideration Order at para. 285. We are aware of the pendency of several complaints alleging that LECs proposing to construct video dialtone systems are charging cable operators unreasonable rates. See, e.g., Chronicle Publishing Company v. GTE Hawaiian Telephone Company (GTE Hawaii), Complaint and Request for Declaratory Ruling, P.A. No. 95-001 (filed October 7, 1994) and Jones Spacelink of Hawaii, Inc. v. GTE Hawaii, Complaint and Request for Declaratory Ruling, P.A. No. 95-002 (filed October 24,

foreclosing competition by denying cable systems reasonable access to their pole or conduit space.[84]

41. In the Third Further Notice, the Commission sought comment on whether a similar rule should apply to LECs providing video dialtone service. We now seek additional comment on that proposal in light of C&P Tel. Co. v. U.S and U S West v. U.S. Parties should address whether incentives to abuse control over pole and conduit space are increased if a LEC decides to offer video programming within its telephone service area. In addition, as requested in the Third Further Notice, advocates of such a rule should propose specific language, and should explain how the rule would prevent anticompetitive conduct.

7. Legal and Constitutional Issues

a. Waiver of the Cross-Ownership Ban

42. Section 533(b)(4) of the Communications Act[85] provides that, upon a "showing of good cause," the Commission may waive the 1984 Cable Act's cross-ownership ban. Under Section 533(b)(4), a waiver "shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection."[86] In GTE California, Inc. v. FCC, the United States Court of Appeals for the Ninth Circuit found moot a case in which the FCC had rescinded a waiver granted under Section 533(b)(4).[87] In the course of so holding, and in response to GTE's argument that the waiver should not have been rescinded because Section 533(b) is unconstitutional, the Ninth Circuit stated that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[88]

43. In GTE California v. FCC, the Ninth Circuit raises the question whether the Commission may establish conditions under

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1994).

84 Video Dialtone Reconsideration Order at para. 285.

85 47 U.S.C. § 533(b)(4).

86 Id.

87 See GTE California v. FCC, 39 F.3d at 942.

88 Id. at 946.

which it will waive the telco-cable cross-ownership ban in order to obviate potential constitutional difficulties. For example, the Commission may decide to authorize any telephone company to provide video programming, whether or not it has obtained an injunction, if it complies with the safeguards we will establish in this proceeding. Our tentative conclusion is that such a reading of Section 533(b)(4) is consistent with the terms of the statute. "Good cause" is commonly interpreted to include changed circumstances, and the circumstances that led us to institute the cross-ownership rule in 1970 have changed dramatically. The cable industry is no longer a fledgling industry. Instead, as the Supreme Court recently recognized, "Congress found that over 60 percent of the households with television sets subscribe to cable . . . and for those households cable has replaced over-the-air broadcast television as the primary provider of video programming."[89]

44. We also tentatively conclude that the safeguards we will establish will constitute "particular circumstances . . ., taking into account the policy" of Section 533(b), under which waivers are warranted. We do not intend to waive the telco-cable cross-ownership rule altogether, so that telephone companies may purchase cable companies that do not face competition and offer their own programming via a monopoly cable system. Rather, and in fulfillment of the policy underlying Section 533(b), we intend to promote competition in the multi-channel video programming market by establishing particular conditions under which telephone companies may establish video dialtone systems that will compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems.

45. The United States Court of Appeals for the District of Columbia Circuit recognized, in NCTA v. FCC (1990), that "the policy of this subsection is to promote competition."[90] However, in that decision the D.C. Circuit also appeared to give a narrow reading to the scope of the waiver provision. Specifically, the court of appeals remanded a decision in which the Commission had granted a waiver because the court concluded that the Commission had not shown that the participation of an affiliate of a telephone company in constructing transmission facilities was "essential to the success" of an experimental video programming project.[91] But at that time no court had declared Section 533(b) unconstitutional, and the D.C. Circuit did not consider whether a

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89 Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2454 (1994).

90 NCTA v. FCC (1990), 914 F.2d at 287.

91 Id. at 289.

broader reading of Section 533(b)(4) was appropriate to render the provision constitutional. The Supreme Court has recently reiterated that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[92] A reading of the waiver provision that authorizes telephone companies that comply with the safeguards we will establish to provide video programming should render Section 533(b) constitutional, because in those circumstances any burden on speech by telephone companies will be minimal. Hence, under U.S. v. X-Citement Video, a broad interpretation of Section 533(b)(4) seems warranted. We seek comment on these tentative conclusions.

b. Constitutionality of Proposed Safeguards

46. As the Court of Appeals for the Fourth Circuit stated in C&P Tel. Co. v. U.S., in order for a content-neutral government regulation of speech, such as the cross-ownership ban, to be constitutional, that regulation must be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information."[93] The court determined that the government's interests in promoting competition and in facilitating the availability of multiple information sources are significant. The court decided, however, that the ban against telephone companies operating as cable service providers was not narrowly tailored and that there were available less burdensome alternatives to the ban.[94] The court observed that the Commission had already identified one possible alternative in its recommendation to Congress regarding repeal of the ban: Congress could limit the telephone company to a fixed percentage of available channels, while requiring the remainder of channels to be made available to others on a common carrier basis.[95] Finally,

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92 United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994) (U.S. v. X-Citement Video).

93 C&P Tel. Co. v. U.S. slip op. at 31 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

94 C&P Tel. Co. v. U.S. slip op. at 38.

95 Id. at 38-39 & n.34 (citing Video Dialtone Reconsideration Order). While the court discussed the availability of options less burdensome than the cross-ownership ban, it did not address the constitutionality of any such alternative. The court cited the alternative "not to imply its constitutionality, but only to show [the ban] itself is unconstitutional." Id. at 39 n.34.

the court determined that, under the ban, there did not exist for telephone companies ample alternative methods of communication.[96]

47. In U S West v. U.S., the Court of Appeals for the Ninth Circuit agreed with the Fourth Circuit that (assuming it served a significant government interest) the ban was not sufficiently narrowly tailored. The court found that the evidence submitted by U S West demonstrated that the procompetitive goals of the ban can be "achieved through a variety of less speech-restrictive means."[97] Unlike the Fourth Circuit, however, the Ninth Circuit, determining that it was unnecessary to do so, did not reach the issue of the availability of "ample alternative channels of communication."[98]

48. With respect to all proposals set forth above for safeguards on LEC provision of video programming, we seek comment on whether such safeguards, whether individually, or in any combination, would be consistent with the First Amendment, the Fourth Circuit's decision in C&P Tel. Co. v. U.S., and the Ninth Circuit's decision in U S West v. U.S.

IV. EX PARTE PRESENTATIONS

49. This Fourth Further Notice of Proposed Rulemaking is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Fourth Further Notice of Proposed Rulemaking is as follows:

51. Reason for Action: The Commission is issuing this Fourth Further Notice of Proposed Rulemaking to consider whether additional or modified safeguards and rule changes may be necessary or appropriate in the context of the video dialtone regulatory framework, when a telephone company provides video programming directly to subscribers in its telephone service area.

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96 Id. at 40.

97 U S West v. U.S. slip op. at 15910.

98 Id. at 15913.

52. Objectives: The objective of the Fourth Further Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

53. Legal Basis: The Fourth Further Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 2, 4, 201-205, 215, 218, 220, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, and 303(r).

54. Description, potential impact, and number of small entities affected: Any rule changes that might occur as a result of this proceeding could impact entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis. The Secretary shall send a copy of this Fourth Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, et seq.

55. Reporting, recordkeeping, and other compliance requirement: None.

56. Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

57. Any significant alternatives minimizing impact on small entities and consistent with state objectives: The Fourth Further Notice of Proposed Rulemaking seeks comment on a variety of alternatives.

58. Comments are solicited: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Fourth Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

VI. COMMENT FILING DATES

59. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before March 6,

1995, and reply comments on or before March 21, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554, with a copy to Peggy Reitzel of the Common Carrier Bureau, Room 544, and James Yancey of the Cable Services Bureau, Room 408C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C.

VII. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, and 220, a FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking

The Commission, in this Fourth Further Notice of Proposed Rulemaking (Notice) commences a proceeding to consider the adoption of rules governing telephone companies' provision of video programming directly to their video dialtone subscribers. This action is in response to recent court decisions, such as the Fourth Circuit decision in C&P Tel. Co. v. FCC.[1] In that decision, the U.S. Court of Appeals held that the cross-ownership ban established by the Cable Communications Policy Act of 1984 violates the First Amendment rights of telephone companies because the ban is not "narrowly tailored to serve a significant government interest." Among many issues, this Notice seeks comment on (1) a tentative conclusion that telephone companies should be allowed to become programmers on their own video dialtone platforms, subject to appropriate safeguards, and that, in light of the public interest benefits of video dialtone, the Commission should not ban telephone companies from providing their own video programming over their own video dialtone platforms; (2) whether the Commission has authority to require telephone companies that wish to provide video programming directly to subscribers in their own service areas to do so over a video dialtone system and not over a traditional cable television facility; and (3) the extent to which Title II and Title VI of the Communications Act, which govern common carrier and cable services, respectively, should apply to telephone companies in their provision of video programming to subscribers.

My support for the development of video dialtone has been based on several principles, including (1) establishing a regulatory framework that could provide incentives for additional facilities-based competition for video programming services, and (2) providing

[1] Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir.Nov. 21, 1994); U.S. West, Inc. v. United States, No. CV-93-01523-BJR (9th Cir. December 30, 1994).

regulatory incentives for telephone company investment in network modernization.[2] I also have observed that our consideration of video dialtone issues should reflect the shifting competitive and regulatory environment in the multichannel video marketplace.[3] I write separately regarding this Notice, therefore, in order to highlight my interest in certain competitive issues in the marketplace for multichannel video programming as well as for broadband services that arise as the Commission initiates the process to enable telephone companies to provide video programming directly to their video dialtone subscribers. Most fundamentally, while I underscore my support for video dialtone as a major step in the regulation of converging industries,[4] I believe it is important to remain careful in addressing the tendency toward the "cablizing" of video dialtone systems. In our recent reconsideration of the regulatory framework governing video dialtone, with respect to the Commission's decision to reject the "anchor programmer" structure, I observed that allowing video programmers such wide latitude to participate in the operation of the basic video dialtone platform would heighten the risk of discrimination in the provision of programming services.[5] To the extent that economic or marketing considerations would create incentives to rely primarily on a single programmer, I also expressed concerns that results of an anchor programmer structure would be more consistent with "cable" service rather than the common carrier obligations under Title II of the Communications Act.

I question, therefore, whether many similar public policy issues are raised now as we consider the rules governing telephone companies as they provide video programming directly to their subscribers as programmers on their video dialtone platforms. If similar policy questions are raised in this context, I especially am interested in comments regarding how the Commission may resolve these policy questions with some degree of consistency, recognize the evident incentives for local exchange carriers to structure their video dialtone systems in many ways like a cable system, and yet maintain the distinct role of video dialtone as a common carrier service. For instance, we now face questions including whether to apply Title II or Title VI to a LEC's video dialtone system where it serves as a programmer, and whether to require the LEC to pursue a franchise from local

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[2] See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 (CC Docket No. 87-266), Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) ("Second Report and Order")(Separate Statement of Commissioner Andrew C. Barrett).

[3] See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, released November 7, 1994 ("Memorandum Opinion and Order") (Separate Statement of Commissioner Andrew C. Barrett).

[4] See Second Report and Order (Separate Statement of Commissioner Andrew C. Barrett); Order and Authorization, New Jersey Bell Telephone Company video Dialtone Application (Dover Township, NJ), FCC 94-180, (released July 18, 1994)(Separate Statement of Commissioner Andrew C. Barrett); and Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

[5] See Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

authorities for its video dialtone system. In this context, and in response to recent court decisions, I am interested in comments that address ways in which the Commission can maintain a common carrier model for video dialtone systems, and avoid potential regulatory disparities and competitive inequities in the multichannel video marketplace.

I also have previously stated that the Commission's decision to continue along the path of authorizing video dialtone service is a fundamental step toward replacing the function of cable rate regulation with competitive constraints in the multichannel video marketplace.[6] In doing so, I am concerned that those competitive constraints must be founded on a policy that avoids regulatory disparities among potential competitors. This proceeding poses an array of questions, and the Commission's answers to those questions will determine the extent to which a truly competitive marketplace for multichannel programming and broadband services will emerge. Thus, in this proceeding, and as a result of the concurrent decision to grant Bell Atlantic's 214 application for the northern Virginia market trial subject to the policies determined in this proceeding,[7] I am concerned that we may already need to consider issues beyond the immediate questions regarding telephone companies' provision of programming on their video dialtone systems as we are simultaneously generating another range of issues concerning the competitive role of cable operators in responding to the advent of video dialtone systems. For example, where a cable company is able to obtain approval from state authorities to provide local exchange service in a community where they already provide what we regard as "cable television service", I would question how we should respond to requests from the company if it seeks to be regulated under Title II as a "video dialtone system", particularly if it finds those regulatory provisions more favorable?

Furthermore, as the Commission moves forward in the context of an important new aspect of developing a regulatory framework for video dialtone systems, I am concerned that we uphold our responsibilities to address a number of other parallel issues in a manner that provides a similar measure of flexibility, where necessary. As I previously have observed, given that this proceeding embodies a measure of flexibility for LECs in providing programming through video dialtone systems, I still will be interested in the Commission's actions to provide substantial flexibility to cable operators in order to augment the cable rate

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[6] See Second Report and Order, (Separate Statement of Commissioner Andrew C. Barrett).

[7] In the Commission's separate decision to grant Bell Atlantic's application to commence a six-month market trial of video dialtone service in Arlington, Virginia, the Commission also granted Bell Atlantic's proposal to allow its affiliate, Bell Atlantic Video Systems (BVS), to provide video programming via the Bell Atlantic video dialtone platform. In addition to requiring Bell Atlantic to comply with various safeguards, the Commission also stated that Bell Atlantic would be required to comply with any additional safeguards that the Commission might adopt in future proceedings, including this rulemaking. See In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Virginia, For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities to test a new technology for use in providing video dialtone within a geographically defined trial area in northern Virginia, Order and Authorization, (January 12, 1994).

regulations.[8] To that end, among several considerations, I would suggest that we may need to establish final cost-of-service rules as well as standards for cable operators to allocate costs and to pursue incentives to upgrade their distribution networks to provide voice services, improved video services, or other broadband services.

[8] See Memorandum Opinion and Order (Separate Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Telco Programming on Video Dialtone Networks (CC Docket No. 87-266)

I have been -- and I remain -- an enthusiastic supporter of video dialtone. I fully subscribe to the notion that VDT can interject needed competition into the video transport market, stimulate desirable investment in the telecommunications infrastructure, and promote the availability of new programming services. Consumers can reap substantial benefits from a common carrier-based video delivery system, with multiple customer-programmers competing with each other as well as with video programmers using other delivery media.

We begin today to grapple with complex issues of constitutional and statutory analysis that go beyond the web of policy considerations involved in our prior video dialtone decisions. Heretofore, a central tenet of our video dialtone regime was the notion that local exchange carriers were to provide only a transparent conduit, with the role of "customer-programmer" played entirely by unaffiliated entities. We are now contemplating a significant change in that aspect of the VDT framework.

We are brought to the present situation by a series of judicial decisions regarding the First Amendment rights of local exchange carriers. Two circuit courts, as well as district courts in three other jurisdictions, have now held that the cable-telco cross-ownership provisions of the 1984 Cable Act are unconstitutional. This rulemaking ensures that we will consider the full range of issues flowing from these judicial decisions.

For example, we need to consider whether we can or should or must enable the telephone companies to serve as customer-programmers on their own VDT platforms. We need to think through carefully what statutory and regulatory provisions will attach to such activities. We also need to step back, review the big picture, and confirm that our decisions enhance the prospects for vigorous, sustainable, and fair competition.

I am increasingly inclined to believe that consumer benefits can result from permitting carriers to provide video programming on their own VDT platforms. I further believe we can craft safeguards that protect consumers and independent video programmers. I look forward to considering the responses of interested parties to the Notice and to completing this new phase of the rulemaking as quickly as we can -- with due regard for the complexity and the importance of the issues before us.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking (CC Docket No. 87-266)*

In October of last year, I joined my colleagues in voting to affirm and clarify the Commission's video dialtone rules. That action on reconsideration underscored this Commission's firm commitment to regulatory policies designed to enhance competition in the delivery of video services to consumers. The video dialtone rules provide a regulatory framework that permits telephone companies to compete as common carriers in the market for multichannel video services. Consistent with the telephone company-cable television cross-ownership ban enacted by Congress in the 1984 Cable Act,[1] our video dialtone rules currently do not permit telephone companies to provide video programming directly to subscribers over their own common carrier video dialtone platforms.[2]

Recent judicial decisions have struck down the statutory cross-ownership ban as violative of telephone companies' First Amendment rights to speak via video programming within the area served by their common carrier transmission networks.[3] With these court opinions in hand, telephone companies now seek to furnish video programming over their video dialtone platforms, alongside competing unaffiliated video information providers. Thus, telephone companies seek authority to not only provide transmission facilities for video programming but to control the content of that programming over their own facilities in their role as video information providers. The legal landscape upon which video dialtone was conceived has shifted. As a consequence, video dialtone service and traditional cable television service may no longer seem, as one court observed, like "very different creatures."[4]

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[1] 47 U.S.C. § 533(b).

[2] 47 C.F.R. § 63.54(d)(2) (1993).

[3] See, e.g., Chesapeake & Potomac Tel. Co. of Virginia v. United States, No. 93-2340 (4th Cir. Nov. 21, 1994); U S West, Inc. v. United States, No. CV-93-01523-BJR (9th Cir. Dec. 30, 1994).

[4] National Cable Television Ass'n v. FCC, 33 F.3d 66, 75 (D.C. Cir. 1994).

Due to these developments, we now address complex and important legal and public policy issues. We ask how telephone company provision of video programming over video dialtone platforms should be regulated in the public interest. Should the Title II common carrier provisions of the Communications Act govern exclusively? What relevance does or should Title VI of the Act, governing cable communications, have in this context? Should some, but not all, provisions of Title VI apply in these circumstances? And how can we resolve these regulatory questions with fidelity to the judicially-recognized First Amendment rights of telephone companies? These are some (though certainly not all) of the questions we must grapple with, and resolve, in the months ahead.

The communications world has undergone dramatic transformation since 1934, when the basic elements of Title II became law; since 1984, when Congress codified much of Title VI and enacted the statutory cross-ownership ban; and indeed even in the last two years since Congress amended Title VI by enacting the Cable Act of 1992.[5] As I noted in my separate statement to the video dialtone reconsideration order, I look forward to a day "when any entity can enter any sector of the communications market and compete according to the same ground rules."[6] To achieve that goal, we must strive for open communications markets, robust and fair competition, and regulatory parity to the extent possible.

Members of Congress have recognized that these converging communications services no longer fit neatly into the existing titles of the Communications Act and are actively considering changes to the statute. While Congress debates statutory reform, I believe we must forge ahead and address these challenging issues. We should strive to reach the best public interest result we can, consistent with existing law. I urge all interested parties to join in this critical debate and assist us in our task by filing detailed comments that help us resolve these issues.

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[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] See Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (released Nov. 7, 1994) (Separate Statement of Commissioner Rachelle B. Chong at 5).